Litigiousness in Japan: Land of the Rising Law Suit?

Leon Wolff
Faculty of Law, Bond University

For over two decades, Japanese politicians and bureaucrats have struggled to resurrect a lifeless economy. With the 1990s marred by crippling financial crisis, a spate of corporate insolvencies, ongoing scandals in Japan's premier economic ministries, rising unemployment and low to negative growth, policy-makers responded with successive legislative reforms aimed at restructuring public administration and private governance of the economy. The Big Bang financial reforms, large-scale reform of Japanese corporate law, and a restructured bureaucracy are representative examples of this reform effort.

One surprising element to this reform effort is civil justice reforms aimed at nearly tripling the population of lawyers by 2018. This surprises because it contradicts a longstanding government practice of tightly restricting access to the legal profession.[1] Currently, 18,000 lawyers serve a population of 125 million people, about 3 for every 20,000 citizens. Nearly 30% of Japan's court districts have one lawyer (or none) practising in the region. Large commercial law firms are uncommon.[2] The reason for these meagre figures is that the government has controlled the numbers who pass the national bar exam. Pass rates have never surpassed 5% of takers and have usually hovered around the 2-3% range.[3]

Unsurprisingly, then, with so few lawyers, Japan has low litigation rates. In the mid 1990s, for example, there were only 9.3 cases per 1,000 people in Japan compared to 123.2 cases in Germany, 74.5 in the United States 64.4 in the United Kingdom and 40.3 in France.[4] Even by Asian standards, the rate is low. Based on statistics for new civil cases filed for trial in district courts in Japan, South Korea and Taiwan in 1995-1996, South Korea had five times as many filings and Taiwan about twice as many.[5] Some commentators are claiming that litigation rates are steadily increasing, especially since the beginning of the 21st century.[6] However, others explain that most of the increase is attributable to the surge in expedited debt recovery cases following the bursting of the economic bubble; ordinary contested cases — a better barometer of litigiousness — still remain at relatively low levels.[7]

Why is litigation so much lower in Japan compared to other modern democratic economies? Scholars have long debated this issue.

One of the more popular explanations is the cultural model of Japanese civil justice. This model attributes low levels of litigation to Japanese national traits of harmony and groupism.[8] As far back as the 1960s, Japanese socio-legal scholar Takeyoshi Kawashima argued that Japanese pre-modern' culture meant a low demand for legal professional services. As Japan modernises, Kawashima predicted, more Japanese would eventually accept litigation as a means to resolve their disputes.[9] Several scholars have endorsed Kawashima's thesis, although with different normative conclusions. For example, Chin and Lawson[10] agree that Japanese are culturally averse to law. Japanese attitudes to law have been shaped geographic isolation, ethnic homogeneity and religious thought. Instead of law, the authors submit, non-legal forces ensure social order. Like Kawashima, the authors suggest that only social change will bring about a change of legal consciousness; but, whether change happens or not, they evaluate Japanese attitudes to law quite positively as "law of the subtle mind". By contrast,

Inoue assesses Japanese legal culture more darkly. The communitarian ethic — which carries with it an aversion to the individualism of rights-talk — carries real social costs, Inoue warns.[11]

Comparative law researchers have strongly criticised the cultural model and offered alternative explanations. One of the first counter-explanations stresses institutional factors over cultural attributes. Specifically, this model points to a number of institutional disincentives in the legal system which deter litigation.[12] For example, Hayley, while acknowledging that Japanese file proportionately fewer civil suits compared to citizens in other industrialised countries, points to evidence that the Japanese are not reticent about asserting their legal rights. Rather, institutional incapacity — few lawyers and judges, discontinuous nature of trials, and an inadequate range of remedies and enforcement powers — sets up a barrier to bringing suit in Japan.[13] Other institutional barriers include a lack of pre-trial discovery procedures, high contingency fees, prohibitive court costs and the absence of a jury system.[14]

Yet another counter-explanation is that the Japanese civil justice system is politically manipulated. Under this view, political elites — notably, the bureaucracy — manage the pace and direction of social change by channelling disputes away from the courts and into the hands of government-annexed informal dispute resolution facilities. Adherents of this view submit that lower levels of litigation in Japan have nothing to do with a cultural aversion to law; it is more a result of deliberate conservative government policy.[15] Japanese political conservatives prefer informal resolution of disputes because, it is submitted, they view litigation as a threat to the political and social status quo and, therefore, take calculated steps to discourage litigation.[16]

A more controversial explanation for low litigation rates in Japan is advanced by economic rationalists. They advance economic rationales for Japanese litigating behaviour. Under this view, Japanese prefer to settle because damages verdicts are predictable and it is cheaper — or economically "rational" — to bargain in the shadow of the law rather than pursue litigation. A cultural aversion to law, argue economic rationalists, is pure myth.[17] Ramseyer and Nakazato, for example, contend that the Japanese preference to settle cases out of court is not culturally pre-determined nor compelled by structural impediments in the legal system.[18] Japanese settle because they can predict what damages they might get if they pursued their dispute in court and, therefore, simply bargain "in the shadow of the law". Settling is cheaper and quicker than pursuing a court case. This shows that the Japanese are bound by rationality, not culture, because they will maximise — not forsake — their self-interest. And it proves that the Japanese legal system works, because, if disputants are settling their disputes in light of expected litigated outcomes, then clearly law is structuring behaviour.[19] Consider, for example, noise pollution from karaoke machines, a big problem in congested Japan.[20] According to case law databases, only about 40 disputes result in litigation brought before Japanese courts. By contrast, nearly 100,000 cases are heard each year by pollution complaint counsellors, an informal dispute resolution service established by the Dispute Law. Under the law, counsellors have strong, judge-like powers to consult with residents, investigate pollution incidents, and provide guidance and advice. Filing a complaint involves no direct monetary cost, does not preclude filing a concurrent (or subsequent) law suit, and allows complaints to be heard and dealt with relatively swiftly due to the lack of formalities.

Today, the debate about Japanese litigiousness has taken a new turn. Now, it is less about explaining why litigation rates are *low*; it is more about whether or not Japanese society

should embrace *more* litigation. This is quite unlike the nature of the litigiousness debate in Australia and the United States!

Even more unusually, the Japanese government has accepted that more lawyers, more litigation — that is a more robust civil justice system — is key to Japan's economic recovery. So much is clear from the 2001 report by the Justice System Reform Council ("Recommendations of the Justice System Reform Council — For a Justice System to Support Japan in the 21st Century, the Justice System Reform Council"). In the opening chapter, for example, the Report highlights Japan's "difficult conditions", especially in the management of the political economy, and the need to restore "rich creativity and vitality to this country." The Report goes on to suggest that state-based economic planning must give way to a more participatory market economy built on open and transparent rules. "The justice system," the Report submits, "should be positioned as the 'final linchpin' of a series of various reforms concerning restructuring of the shape of our country."[21]

Lawyer numbers and legal education are strongly positioned within this agenda to kick-start economic growth through law. The objective is obvious: to expand the pool of talent capable of working through the complexities wrought by Japan's integration into a global economic order. Thus, the proposals envision a more rigorous training in law in graduate law schools, as opposed to the current system of undergraduate interdisciplinary education in politics, economics, languages and law. Graduates of law schools would then sit for a revised bar examination and substantially more — as many as 70-80% — would be allowed to pass. The Legal Research and Training Institute, the legal training arm of the Supreme Court of Japan, would grow in institutional capacity to groom those successful in the bar examination for careers in private practice, the judiciary or the procuracy. The end result — an expanded population of technical experts proficient in the art of complex problem-solving.

This cuts against prevailing orthodoxy. Most economists argue that lawyers *inhibit* economic growth. Indeed, empirical studies have shown an inverse relationship between the number of lawyers and the vibrancy of the economy. Lawyers, many economists conclude, are a drag on the economy. Unlike entrepreneurs and engineers, lawyers do not generate wealth; they are rent-seekers who contribute complexity and other costs to completing transactions.[22]

Clearly Japan does not think so.

---

[1] J Mark Ramseyer and Minoru Naazato, *Japanese Law: An Economic Approach* (University of Chicago Press, 1999), 6-7.
[2] Bruce Aronson, 'The Brave New World of Lawyers in Japan' (2007) 21 *Columbia Journal of Asian Law* 45.
[3] Ramseyer and Naazato, above n 1, 6-7.
[4] Iwao Sato, 'Judicial Reform in Japan in the 1990s: Increase of the Legal Profession, Reinforcement of Judicial Functions and Expansion of the Rule of Law (2002) 5(1) *Social Science Japan Journal* 71, 71.
[5] John O Haley, 'Litigation in Japan: A New Look at an Old Problem' (2002) 10 *Willamette Journal of International Law & Dispute Resolution* 121, 124.
[6] Tom Ginsburg & Glenn Hoetker, 'The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation' (2006) 35 *Journal of Legal Studies* 31.
[7] Takao Tanase (trans Luke Nottage and Leon Wolff), *Community and the Law: A Critical Reassessment of American Liberalism and Japanese Modernity* (Edward Elgar, 2010), 158.
[8] Kenneth L Port, 'The Case for Teaching Japanese Law at American Law Schools' (1994) 43 *Depaul Law Review* 643, 659-670.
[9] Takeyoshi Kawashima, 'Dispute Resolution in Contemporary Japan' in Arthur von Mehren (ed), *Law in Japan: The Legal Order in a Changing Society* (Harvard University Press, 1963) 41.

[10] Chin Kim & Craig M Lawson, 'The Law of the Subtle Mind: The Traditional Japanese Conception of Law' (1979) 28 *International & Comparative Law Quarterly* 461.
[11] Tatsuo Inoue, 'The Poverty of Rights-Blind Communality: Looking Through the Window of Japan' (1993) *Brigham Young University Law Review* 517.
[12] Port, above n 8, 659-670.
[13] John O Haley, 'The Myth of the Reluctant Litigant' (1978) 4 *Journal of Japanese Studies* 359.
[14] Nobutoshi Yamanouchi & Samuel J. Cohen, 'Understanding the Incidence of Litigation in Japan: A Structural Analysis' (1990) 17 *Southern University Law Review* 171.
[15] Port, above n 8, 661-662, 669-670.
[16] Frank K Upham, *Law and Social Change in Postwar Japan* (Harvard University Press, 1987), 16-27, 124-165.
[17] Port, above n 8, 661-662, 668-669.
[18] J Mark Ramseyer & Minoru Nakazato, 'The Rational Litigant: Settlement Amounts and Verdict Rates in Japan' (1989) 18 *Journal of Legal Studies* 263.
[19] Ibid.
[20] Mark West, *Law in Everyday Japan: Sex, Sumo, Suicide, and Statutes* (University of Chicago Press, 2005), 90-91. See also Mark West, 'The Pricing of Shareholder Derivative Actions in Japan and the United States' (1994) 88 *Northwestern University Law Review* 1436.
[21] For a summary of the Justice System Reform Council report, see Daniel H Foote, 'Introduction and Overview: Japanese Law at a Turning Point' in Daniel H Foote (ed), *Law in Japan: A Turning Point* (University of Washington Press, 2007) xix.
[22] Curtis Milhaupt and Mark West, 'Law's Dominion and the Market for Legal Elites in Japan' (2003) 23(2) *Law and Policy in International Business* 451.